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Held at the Palais des Nations, Geneva, on Wednesday, 4 July 2018, at 3 p.m.

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Peremptory norms of general international law (*jus cogens*) (*continued*)

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.15 p.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 9) (*continued*) (A/CN.4/714 and A/CN.4/714/Corr.1)

The Chair invited the Commission to resume its consideration of the third report of the Special Rapporteur on peremptory norms of general international law (*jus cogens*).

Mr. Peter said that the Special Rapporteur did not need to be apologetic about the length of his report, which was not as long as certain reports that had been produced in the past. Although Commission members were used to considering one, two or three draft conclusions at a time, there were no rules or policies to prevent the Special Rapporteur from proposing a larger number. In view of that, he urged the Commission to place greater emphasis on being more productive.

Peremptory norms of general international law, much like customary international law, had not been developed by all members of the international community as it was currently constituted. Rather, they had been developed by a few States at a time when the majority of States had been subjugated and given demeaning titles such as colonies, protectorates, mandates and trustee territories. Hundreds of treaties had been entered into, purportedly on behalf of the subjugated territories, and some remained in force. Efforts to resist those treaties by invoking principles such as *clausula rebus sic stantibus* — a fundamental change in circumstances — had been unsuccessful. However, he believed that the Special Rapporteur's work on *jus cogens* provided a solution to the problem, notably in draft conclusion 10 (2): "An existing treaty becomes void and terminates if it conflicts with a new peremptory norm of general international law (*jus cogens*) that emerges subsequent to the conclusion of the treaty. Parties to such a treaty are released from any further obligation to perform in terms of the treaty." Such an innovative approach would allow the Commission to move beyond the 1969 Vienna Convention on the Law of Treaties. *Jus cogens* norms, if accepted in good faith, would sanitize international law, which was defective and controlled by a few States owing to its colonial background and the international imbalance of power.

Acknowledging the comments of other Commission members on inconsistencies in the use of words such as "void", "invalid", "arise" and "emerge", he said that such inconsistencies should be rectified, but only after careful consideration. To assist the Special Rapporteur in resolving the issues surrounding the use of the words "invalid" and "void", he wished to draw attention to the case of *A.A. Sisya and 35 Others v. Principal Secretary, Ministry of Finance and Another*, heard by the High Court of Tanzania at Dodoma, in which the judge had ruled that:

> The law which is void … is as if it was not there … a void law is not operative at all and so any title or money paid under a void law are not operative at all. And no one is obliged to pay any surtax under this law which has been declared void. My considered view is that you cannot amend a statute that has been declared void as that is an exercise in futility. It is just common sense that you cannot amend legislation which is non-existent.

It was clear that some of the objections raised about specific draft conclusions reflected the positions expressed by speakers in other forums, for example in relation to the principle of universal jurisdiction. That principle was addressed in draft conclusion 22, though it was not specifically mentioned. The draft conclusion appeared to have solid support among members of the Sixth Committee, which showed that the draft conclusion was in line with the thinking of many. Given that draft conclusion 23 covered virtually the same subject matter as article 27 (1) of the Rome Statute of the International Criminal Court, it was not surprising that those who had opposed the Rome Statute were also vehemently opposed to draft conclusion 23. Nevertheless, he hoped that a sense of fairness would prevail.

He did not believe that it was necessary to divide the draft conclusions into different parts, although it seemed from paragraph 161 of the report that the Special Rapporteur was open to the idea. Rather, it was necessary to match the draft conclusions with the relevant parts of the report and to fit them into the document seriatim. Like several previous

speakers, he would like the Special Rapporteur to provide an illustrative list of *jus cogens* norms. For that purpose, the Special Rapporteur might be interested in the article by Marjorie M. Whiteman entitled "*Jus cogens* in international law, with a projected list", published in the *Georgia Journal of International and Comparative Law* in 1977. However, the number of *jus cogens* norms was likely to have increased since the article's publication.

Noting that draft conclusion 17 had given rise to debate during the previous meeting, he supported the formulation proposed by the Special Rapporteur, in particular the mention of the Security Council. While the arguments for mentioning the Security Council were set forth in paragraph 150, he wished to add that the Security Council had five unelected members who had, for 70 years, wielded immense power and taken decisions with repercussions for the whole world. That was a good reason why the Security Council should be kept in check; it was not above the law and it should bear in mind the need to respect *jus cogens* norms in any action it contemplated. Those who did not want the Security Council to be mentioned should explain their position: it was not enough simply to say that the formulation was "inappropriate". In conclusion, he recommended that the 14 draft conclusions should be referred to the Drafting Committee.

Sir Michael Wood said that although the third report covered much ground with remarkable conciseness, the complexity and importance of the points addressed were such that it might have been better if the Special Rapporteur had given more in-depth consideration to fewer points and produced, say, five or six draft conclusions. Nevertheless, the report had stimulated an interesting and lively debate on *jus cogens* norms and he was confident that the Commission would be able to reach a consensus on the topic. Given that he was broadly in agreement with what many speakers had already said, he would not attempt to be comprehensive in his comments, nor deal with drafting matters or touch on the sometimes imprecise or confusing expressions used in the report, such as "*jus cogens* crimes".

As he had noted in 2017, the Commission had taken a bold step in placing *jus cogens* on its programme of work; he continued to support its efforts on the topic, where there was a pressing need for clarity. *Jus cogens* was, by its nature, potentially disruptive to international law: even the fundamental principle of *pacta sunt servanda* might, in rare cases, have to give way to it. So too might rules of customary international law that would otherwise bind States, general principles of law within the meaning of article 38 (1) (c) of the Statute of the International Court of Justice and — at least theoretically if not in practice — the binding decisions of the Security Council. While the effects of *jus cogens* were all well and good in theory, in practice they posed a serious risk if individual States were able to evade their treaty obligations under customary international law, and even under Security Council resolutions, simply by invoking what they claimed to be a conflict with a *jus cogens* norm. For that reason, States at the United Nations Conference on the Law of Treaties had insisted on the inclusion of the procedural safeguards in section 4 of the 1969 Vienna Convention on the Law of Treaties, in particular articles 65 and 66 (a), as a crucial part of the package on *jus cogens* set forth in the Convention. Even then, not all States had accepted those provisions. It was therefore good that the Special Rapporteur had acknowledged the importance of the procedural safeguards by proposing draft conclusion 14. He agreed with Mr. Nolte's suggestion that the Commission ought to consider the matter further and should strengthen the proposed draft conclusions as much as possible.

Considering that the negotiating history of article 53 of the 1969 Vienna Convention was covered only briefly in the first report (A/CN.4/693), he wondered whether the Commission required a more thorough, systematic and chronological account of the negotiating history of that article, as well as of articles 64 and 66 (a) and other relevant provisions of the 1969 and 1986 Vienna Conventions on the law of treaties. Considering that such an account would be useful for the Commission's ongoing work, he would be interested in hearing the views of the Special Rapporteur, and the secretariat, in that regard.

Turning to the substantive issues raised in chapter III of the third report, concerning the consequences of peremptory norms of general international law (*jus cogens*), he wished to point out that such consequences were referred to as "legal effects" in draft conclusion 1: consistent terminology should be adopted. Section A, entitled "General", did not assist in the understanding of subsequent sections dealing with specific issues and should not be

taken up in the Commission's commentaries. The main problem was that the Special Rapporteur sought to attach legal significance to what had been put forward as essentially descriptive elements, which the Special Rapporteur now termed "characteristics" of *jus cogens* norms.

Those considerations raised questions about draft conclusion 2, as provisionally adopted by the Drafting Committee. Some Commission members had considered it confusing to seek to indicate the "characteristics" of *jus cogens* — or its "general nature", according to the title of that draft conclusion — when the criteria for the identification of *jus cogens* norms were clearly defined in the second sentence of article 53 of the 1969 Vienna Convention. One such criterion was non-derogability, which was not a legal consequence. Those criteria were dealt with more or less satisfactorily in draft conclusions 3, 4 and subsequent draft conclusions provisionally adopted by the Drafting Committee. However, draft conclusion 2 continued to raise serious doubts. What was its purpose? Did it have operative effect, or was it preambular in nature? The Commission must avoid any suggestion that *jus cogens* norms could be identified on the basis of their so-called "characteristics" — some of which were entirely subjective — since such a suggestion would increase the uncertainty surrounding the identification of *jus cogens* norms. He was not personally in favour of keeping draft conclusion 2 in the text, but if it were to be kept, all those questions would need to be addressed in the commentary.

Indeed, his doubts about draft conclusion 2 were reinforced by some passages in the third report. According to paragraph 28, for example, "some members of the Commission and some States" had suggested that the characteristics of *jus cogens* should be "addressed in the context of consequences", while the Special Rapporteur had expressed the view that those characteristics themselves had consequences, claiming that "one of the consequences of hierarchical superiority [was] the invalidating effect on other norms of international law". In short, what had formerly been regarded as descriptive had become something from which consequences were to be drawn, which did nothing to clarify the text of the draft conclusions.

Draft conclusions 10 to 14 concerned specific consequences of *jus cogens* in relation to treaties, restating and seeking to elaborate on some fundamental rules that were already in the 1969 Vienna Convention. In his view, draft conclusions that restated the 1969 Vienna Convention ought to keep precisely to the language of that Convention. He would make some suggestions in that regard to the Drafting Committee.

Draft conclusion 15 sought to describe the consequences of *jus cogens* norms for rules of customary international law. Although he did not disagree with its substance, he was concerned about some of the formulations. For example, according to paragraph 1: "A customary international law rule does not arise if it conflicts with a peremptory norm of general international law (*jus cogens*)." It was difficult to see how a new rule of customary international law that conflicted with an existing *jus cogens* norm could ever come into being, if only to be found to be void. He shared the view attributed to Kawasaki in paragraph 138 of the third report: how could sufficient State practice and acceptance as law come about in conflict with a norm that the international community of States considered to be non-derogable? Further thought should be given to whether the words "arise" in paragraph 1 and "ceases to exist" in paragraph 2 were well chosen. However, he agreed with the Special Rapporteur that there was no reason why a *jus cogens* norm should not arise even if there had been one or more persistent objectors to an emerging rule of customary international law that had the potential to achieve *jus cogens* status.

A separate question was whether a State that had established itself as a persistent objector to a rule of customary international law that later achieved *jus cogens* status would be bound by the *jus cogens* norm, and thus by the rule of customary international law. The Special Rapporteur had concluded that it would indeed be bound, in consequence of the fact that *jus cogens* norms were universally applicable and non-derogable; he was not entirely convinced by the Special Rapporteur's reasoning, although the result was not necessarily wrong.

Regarding draft conclusion 17, which addressed the consequences of *jus cogens* norms for binding resolutions of international organizations, he shared the concerns of other

members concerning the possibility that States might refuse to comply with binding Security Council resolutions based on an allegation of a breach of a *jus cogens* norm. One speaker had mentioned by way of example the Security Council resolutions concerning the surrender of persons accused of the Lockerbie bombing; in fact, the allegations of an unlawful threat of force had been made by Counsel for Libya in the case before the International Court of Justice and had been refuted by the Agent and Counsel for the United Kingdom as having no basis whatsoever in fact. In view of the members' concerns, the inclusion of a separate reference to Security Council resolutions seemed unwise and risked undermining the effectiveness of its resolutions and the collective security system put in place by the Charter of the United Nations, and could even take the international community back to the era of the League of Nations, when each member ultimately decided whether or not to comply with the decisions of the Council of the League.

Noting that the report aimed to cover the effects of *jus cogens* on other main sources of international law in addition to treaties — customary international law, as well as unilateral acts and resolutions of the Security Council under Chapter VII of the Charter of the United Nations — he agreed with other speakers that there was no reason not to deal with the legal effects of *jus cogens* on another source of international law, namely general principles of law within the meaning of article 38 (1) (c) of the Statute of the International Court of Justice.

The assertion in draft conclusion 18 that peremptory norms of general international law (*jus cogens*) "established" obligations *erga omnes* and that the breach of such obligations merely "concerned" all States required careful examination by the Drafting Committee.

Draft conclusion 19 (1), concerning circumstances precluding wrongfulness, should be more closely aligned with article 26 of the articles on responsibility of States for internationally wrongful acts of 2001. Paragraph 2 was a useful clarification. Regarding the explanation of draft conclusion 20, on the duty to cooperate, contained in paragraphs 90 to 94 of the report, the extent to which a duty to cooperate reflected existing law or was a progressive development could be left open, as could the question of what precise obligations flowed from a duty to cooperate. Draft conclusion 20 (1) was closely aligned with article 41 (1) of the articles on State responsibility; however, paragraph 2 did not exactly reflect the language of article 40 (2), which referred to a "gross and systematic failure" by the responsible State to fulfil the obligation. He considered that it should do so, since otherwise questions would arise as to whether the notion of a serious breach had a different meaning in the draft conclusions and the articles. He was not convinced that draft conclusion 20 (3), dealing with possible forms of cooperation, was necessary or desirable, considering that the language did not appear in the articles on State responsibility. Moreover, the terms "institutionalized cooperative mechanisms" and "*ad hoc* cooperative arrangements" were not particularly clear and might be better explained in the commentaries. Draft conclusion 21, concerning the duty not to recognize or render assistance in the maintenance of a situation created by a breach of a *jus cogens* norm, corresponded to article 41 (2) of the articles on State responsibility; however, some members had pointed out that the adjective "serious" had been omitted from the draft conclusion. He believed that the word ought to be included so as to avoid greatly expanding the principle contained in the articles.

Finally, expressing agreement with Mr. Nolte's analysis of the problems arising in respect of draft conclusions 22 and 23, he said that those provisions did not reflect current law and practice and did not properly form part of the Commission's work. Therefore, while agreeing that draft conclusions 10 to 21 should be referred to the Drafting Committee for examination in the light of the Commission's debate, he was against referring the proposed draft conclusions 22 and 23 to the Drafting Committee.

Ms. Escobar Hernández said that it was important to examine the effects of *jus cogens* norms on the international legal order and welcomed the fact that the Special Rapporteur's excellent third report tackled the issue in a comprehensive and pragmatic manner. The Special Rapporteur had not overlooked the fact that the legal and practical basis for the effects described was different for each area covered, as reflected in both the content and structure of his report and the draft conclusions proposed. The draft

conclusions could be separated into three groups, dealing respectively with the effects of peremptory norms on sources of international law and other acts that could give rise to legal obligations (draft conclusions 10 to 17), the effects of peremptory norms on State responsibility (draft conclusions 18 to 21) and the effects of peremptory norms on individual criminal responsibility and immunity from jurisdiction in respect of what the Special Rapporteur referred to as "*jus cogens* crimes", though that terminology seemed somewhat dubious.

With regard to the issues covered by the first group of draft conclusions, she welcomed the fact that the Special Rapporteur had looked not only at treaties but also at other sources of international law and at acts that could give rise to rights and obligations. If the concept of a peremptory norm was characterized by an element of hierarchical superiority, the Commission must examine the effects of such norms on all sources of international law and on any other instrument — normative or otherwise — capable of creating international obligations. She therefore welcomed the draft conclusions dealing with the effects of *jus cogens* on treaties and customary norms, which were undeniably normative and sources of international law, and the inclusion of draft conclusions on the effects of *jus cogens* on unilateral acts and resolutions of international organizations, insofar as they could generate international obligations, although she did not altogether share the Special Rapporteur's views on the nature of such instruments. That said, it was also important to consider the effects of *jus cogens* on general principles of law, which should be the same as for other international norms. Failing to examine the issue would sow confusion and required greater justification than was given in the report.

Certain statements made in the report and some of the draft conclusions proposed called for further reflection. The Special Rapporteur had given particular weight to the effects of peremptory norms on treaties, which was understandable, especially as the concept of *jus cogens* had first been codified in the 1969 Vienna Convention on the Law of Treaties. It was likewise logical that he had striven to reflect the provisions thereof closely, such as by distinguishing between invalidity of a treaty under article 53 of the Convention and invalidity and termination under article 64. In places, however, the text of the draft conclusions departed from that of the Convention, sometimes unacceptably.

Draft conclusion 10 dealt with two separate points: the invalidity of a treaty that conflicted with a peremptory norm of international law and the specific consequence of invalidity and termination set out in article 71 (2) (a) of the 1969 Vienna Convention. While the Special Rapporteur had clearly sought to ensure parallel treatment for invalidity under article 53 and invalidity and termination under article 64, it would be useful for the distinction to be explained in the commentary so as to avoid any confusion or erroneous interpretation of draft conclusion 10 and its scope. The wording "any further obligation" in draft conclusion 10 differed from that of article 71 (2) (a). Similarly, the words "as far as possible" did not appear in paragraph 1 of draft conclusion 12, which otherwise reflected article 71 (1) (a) of the Vienna Convention. Their omission, albeit perhaps motivated by a desire to strengthen the effect of peremptory norms, had significant consequences that were hard to justify, particularly in terms of acts performed in good faith under a treaty that was subsequently invalidated. The paragraph should therefore be altered accordingly and an explanation included in the associated commentary, referring to the principle of good faith. Paragraph 2 of draft conclusion 12 should be aligned more closely with article 71 (2) (b) of the Vienna Convention: as currently drafted, it was more restrictive than that provision in both letter and spirit. The report contained no clear rationale for referring to a direct conflict between a right, obligation or legal situation and a peremptory norm, rather than between a new peremptory norm and the maintenance of rights, obligations or situations created prior to the emergence thereof.

In the Spanish version of draft conclusions 10, 11 and 12, it would be preferable to render the notion of being in conflict with a peremptory norm by the terms "*estar en oposición*" or "*ser incompatible*", rather than "*estar entrar en conflicto*", in line with the usage in the Vienna Convention. The choice of terminology could be explained in the commentary with a view to ensuring uniform interpretation. With regard to draft conclusion 13, the Drafting Committee might wish to consider aligning the text more closely with

guideline 4.4.3 of the 2011 Guide to Practice on Reservations to Treaties, on which it was based.

In draft conclusion 15, the content and structure of which she generally agreed with, the Special Rapporteur had apparently sought to establish a parallel with the effects of *jus cogens* norms on treaties. In the commentary, it would be useful to give a detailed explanation of the particular difficulties that arose in terms of derogating from a peremptory norm of general international law, which could be customary in origin, by virtue of a subsequent norm of general international law having the same character, which might also be of customary origin. She shared the Special Rapporteur's view that the persistent objector rule was not applicable in the current context, but it might be useful for the Drafting Committee to review the draft conclusion so as to clarify its scope and avoid any confusion over the distinction between the role of States in the process of creating a peremptory norm and the absolutely binding nature of such a norm once identified as such.

The report referred to unilateral acts in a rather vague manner not entirely compatible with the Commission's previous work on the subject. The link drawn between unilateral acts and reservations to treaties gave particular cause for concern, as it was potentially confusing to States and others in the legal sphere. While both were expressed by means of unilateral declarations, they differed in purpose — serving to create and to avoid or modify obligations, respectively — and had been handled differently in practice by States, international tribunals and the Commission. The distinction seemed to be reflected in the draft conclusions, in that the effects of peremptory norms on reservations and unilateral acts were covered separately, but it should be made sufficiently clear, if only in the commentary to draft conclusion 16. Alternatively, the problem could be obviated by referring to unilateral acts as "unilateral acts of States".

The intent of draft conclusion 17 (1) — to reaffirm the primacy of *jus cogens* with respect to binding resolutions of international organizations — was sound, but some redrafting might be needed to make it clear that all such resolutions were covered and that its scope was not restricted to resolutions of the Security Council. As not all international organizations passed "resolutions", even though their decisions might be binding, a phrase such as "binding resolutions and other acts of the same nature" [*las resoluciones vinculantes y otros actos de igual naturaleza*] would be less limiting. However, she had no objection to referring specifically to resolutions of the Security Council, which was bound by the principles and provisions of the Charter of the United Nations, many of which were themselves peremptory norms. The fact that the primacy of obligations under the Charter stemmed from a treaty provision — Article 103 of the Charter itself — rather than from customary international law reinforced the position that binding resolutions of bodies such as the Security Council were subject to *jus cogens* norms, irrespective of whether such a situation was likely to arise in practice.

Issues of interpretation and dispute resolution should be approached not just from the perspective of treaties but more generally, and should be dealt with in specific draft conclusions placed after the section covering the effects of peremptory norms on sources of international law and other acts giving rise to international obligations. The principle of consistent interpretation could play a useful role in avoiding incompatibility with norms of *jus cogens*. Paragraph 3 of draft conclusion 10 could potentially be combined with paragraph 2 of draft conclusion 17; either way, the use of the phrase "as far as possible"/"to the extent possible" should be explained in the commentary to ensure that the provision could not be interpreted as excluding the binding acts of some bodies from the scope of peremptory norms. In the context, the phrase must be taken to mean that a consistent interpretation could only occur where technically possible and feasible.

She shared the concerns expressed regarding the potential consequences of submitting disputes involving conflict between a treaty and a peremptory norm to arbitration, as envisaged in draft conclusion 14. It would be better for all such disputes to be submitted to the International Court of Justice, although there should be no effect on the rules regarding the Court's competence, which could not in any case be altered by a text such as the present draft conclusions. Equally, the draft conclusion should not merely refer in general terms to the means of settling disputes given in Article 33 of the Charter, as that was not the approach previously followed by States, particularly in the 1969 Vienna

Convention. At the United Nations Conference on the Law of Treaties, States had agreed to establish a special mechanism for settling disputes involving peremptory norms, as outlined in article 66 (a) of the Convention. The Drafting Committee should consider rewording the draft conclusion to take account of that and other concerns expressed.

With regard to draft conclusion 18, there was a clear need to distinguish between peremptory norms and norms giving rise to obligations *erga omnes* and to avoid creating any hierarchy among norms of *jus cogens*. The wording of the draft conclusion should be reconsidered, taking into account the specific proposals made by Ms. Galvão Teles, among others. Draft conclusions 20 and 21 should be harmonized with article 41 of the articles on State responsibility. In particular, they should both refer explicitly to serious breaches of peremptory norms. Omitting the word "serious" would suggest that the Commission had decided to follow a new course and would need to be justified appropriately, but its third report provided no such justification for departing from article 41 in that respect. Draft conclusion 19 could usefully be supplemented by the addition of a separate draft conclusion dealing with countermeasures. In general, the group of draft conclusions relating to the effects of peremptory norms on State responsibility should also cover the effects of such norms on the responsibility of international organizations, on the basis of the corresponding articles adopted by the Commission in 2011.

Concerning draft conclusions 22 and 23, she fully concurred with the view of the Special Rapporteur and others that, in the light of State practice and the interest States had shown, the issues they covered must be addressed as part of the Commission's work on peremptory norms. She saw no reason not to include draft conclusions 22 and 23. Regardless of whether the precise legal foundation for the duty to exercise domestic jurisdiction over crimes prohibited by peremptory norms, as set out in draft conclusion 22, lay in treaty or custom, that duty could derive from the duty to cooperate in bringing any serious breach of a peremptory norm to an end, in line with article 41 of the articles on State responsibility, and was also linked to the duty not to render aid or assistance in the maintenance of a situation created by a breach of a peremptory norm. Draft conclusion 22 was balanced, providing for the obligation of a State to exercise jurisdiction over offences committed by its nationals or on territory under its jurisdiction, but also referring in non-binding terms to the possibility of establishing jurisdiction on other grounds under its national law. The Drafting Committee might wish to alter the wording of paragraph 2 to clarify that it was a "without prejudice" clause. Draft articles already approved on other topics could serve as a model.

She had no objection in principle to the structure of draft conclusion 23, which maintained the distinction between the irrelevance of official position in determining individual criminal responsibility, on the one hand, and immunity *ratione materiae* and exceptions to such immunity, on the other. That distinction was both reflected in international instruments — such as article 27 of the Rome Statute of the International Criminal Court — and widely supported by practice. Nevertheless, there was potential overlap between draft conclusion 23 and the Commission's work on other topics, particularly the draft articles on crimes against humanity and the draft articles on immunity of State officials from foreign criminal jurisdiction. As Special Rapporteur for the latter topic, she was convinced that irrelevance of official position was an essential element in establishing criminal responsibility for crimes under international law and that immunity *ratione materiae* was not absolute but subject to limits and exceptions. However, she said no wish to reopen the debate that had led, *inter alia*, to the adoption by majority vote of draft article 7 of the draft articles on immunity of State officials. In procedural terms, any overlap or interference between the two issues should be avoided if possible so as to ensure coordination in the Commission's work, which was vital to its legitimacy. Without pronouncing on the merits of draft conclusion 23, she agreed that it might be advisable to postpone the debate until the draft articles on immunity of State officials had been adopted on first reading and the draft articles on crimes against humanity had been adopted on second reading. Draft conclusion 23 could be referred to the Drafting Committee in the meantime.

In terms of future work, providing an illustrative list of peremptory norms would add value to the work of the Commission, despite the inherent risks. A carefully [illegible]

approach would be [illegible] with particular attention paid to ensuring that the list contained only those norms the [illegible] peremptory nature of which was incontrovertible and uncontroversial and avoiding any [illegible] possible interpretation of such a list as a *numerus clausus*, given the dynamic nature of [illegible] international law. Despite her serious reservations about the posited existence of regional *jus cogens*, she awaited the outcome of the Special Rapporteur's research on that subject with interest and hoped that he would proceed with caution, taking into account the concerns expressed by various members of the Commission. Reiterating her appreciation for [illegible] third report, she recommended transmitting draft conclusions 10 to 23 to the Drafting Committee.

The Chair, speaking as a member of the Commission, said that his reading of the Special Rapporteur's third report had left him in somewhat of a quandary. In assigning a topic to a special rapporteur, the Commission expected him or her to map unknown areas of the international legal universe rather than merely redraw the lines that had been known for generations. Unfortunately, his impression was that, in his third report, the Special Rapporteur had largely relied on what the Commission had stated in reports and commentaries on other topics instead of making any fresh proposals concerning *jus cogens* norms. Likewise, the sources cited in the references were mainly the work of the Commission and the Vienna Convention, with very little other material. In his view, the Special Rapporteur had not gone far enough. Given that the Commission's reports were meant to be perceived as authoritative in the wider field of international law, it should strive to bring something new to the topic or, if that was not feasible, at least critically reassess whether what it had written in the last century still held value today. The Special Rapporteur's third report did neither.

During the debate in the Sixth Committee on the controversy surrounding draft article 7 on the immunity of State officials from foreign criminal jurisdiction, the French delegation had warned of the risk of the Commission working too rapidly. The same applied to the current topic. The Special Rapporteur seemed keen to conclude the work on the topic expeditiously, but that might come at the expense of thorough, detailed work or by circumventing controversial issues, as had been noted by Mr. Murphy and Mr. Murase.

He was not always convinced by the manner in which the Special Rapporteur supported his claims with references. For instance, footnote 27 was intended to support the claim that only some States had expressed disagreement with draft conclusion 2 of the previous report, but the States it listed included the United Kingdom, Russia, the United States, China and France, in other words the five permanent members of the Security Council. Footnote 129 defeated its own purpose: the fact that there were already claims seeking to invalidate a treaty on account of conflict with *jus cogens* was evidence that the possibility of such claims was not remote, as asserted by the Special Rapporteur.

He would limit his comments on the content of the report to two areas: the relationship between *erga omnes* obligations and *jus cogens*, and the relationship between customary law and *jus cogens*.

To his mind, it would have been more appropriate to deal with the former in one of the earlier reports. The third report would have benefited from a more thorough discussion of theoretical considerations but instead focused on technicalities under the guise of "practice". The perspective on *erga omnes* obligations presented in the report was very limited and, frankly, conservative. More recent developments, such as the discussion of whether *erga omnes* obligations could follow from rules of environmental protection, were not touched on in the report. He therefore urged the Special Rapporteur to reconsider that issue in more depth and avoid what might seem like simplistic conclusions for the sake of concluding a first reading on the topic in 2019.

Addressing the relationship between *jus cogens* and customary international law, he could not fail to notice that one of the decisions taken in 2017 had come back to haunt the Commission. The fact that the Commission's definition of *jus cogens* had been based on article 53 of the Vienna Convention meant that it now very closely resembled customary law. He agreed with the content of draft conclusion 15 — peremptory norms would not be peremptory if they could be superseded by regular norms of customary law, and there could not be a persistent objector with regard to *jus cogens* — but he did not understand the

reasoning behind it. As he had stressed previously, the Commission could not, on the basis of the content of the current report and the previous reports on the topic, explain what made *jus cogens* norms different from norms of ordinary customary international law. A conception of *jus cogens* based on consent — acceptance and recognition by the international community of States — did not provide a satisfactory explanation for the peremptory nature of *jus cogens* norms, failed to distinguish *jus cogens* from other norms of international law and, ultimately, remained an empty concept. Customary law was clearly based on consensual international law, but unless the Commission decided that *jus cogens* could only emerge if States unanimously agreed on which norms were *jus cogens*, a decision deliberately not taken in 2017, State consent was not the exclusive basis for *jus cogens*. The Commission continued to circumvent the discussion of that extra element which distinguished customary law and *jus cogens*.

In addition, it could be argued that the first two paragraphs of draft conclusion 15 were superfluous. If the processes of creating customary law and creating *jus cogens* were as proximate as had been asserted in the discussion on the topic, two mutually exclusive norms could not emerge in practice. While draft conclusion 15 could certainly be adopted as currently worded, at some point the Commission must find a satisfactory explanation for the difference between customary law and *jus cogens*.

Finally, there was an issue of consistency in the report: if *jus cogens* trumped customary law, did it matter whether there was an exception for violations of *jus cogens* norms in the customary law of immunity *ratione personae*? The whole section on the effects of peremptory norms of general international law on immunity was based on the premise that there must be an exception in the customary law of immunity of State officials in order for *jus cogens* norms to supersede the customary norms of immunity. If draft conclusion 15 was taken verbatim, it could be argued that it was irrelevant whether the norms of immunity contained such an exception, as long as a *jus cogens* norm had emerged which required absolute prosecution of all perpetrators. The latter question could arguably be a matter for the illustrative list of *jus cogens* norms, if the Commission decided to include such a list, or could be discussed in the context of the third report, as it addressed a consequence of *jus cogens*, albeit a specific one. In any case, the argumentation on that issue in the third report was lacking in depth.

In closing, he urged the Special Rapporteur to pursue his journey into the unknown areas of the international legal universe. The topic was of utmost importance and would benefit greatly from a disclosure of the new discoveries that the journey might bring. He was in favour of referring the draft conclusions to the Drafting Committee, in light of the plenary debate and on the usual understandings.

Mr. Jalloh said that it had been his understanding that the Commission would return to the mini-debate that had begun in the plenary that morning in relation to the specific mention of the Security Council in draft conclusion 17 although, given the time constraints, he realized that might not now be possible. He noted with interest that many of those who had spoken on the issue did not question the legal argument put forward by the Special Rapporteur, and some even supported his position. He personally hoped that the substantive point raised in relation to draft conclusion 17 could be referred to the Drafting Committee for discussion, although, as chair of the Drafting Committee, he would not be able to participate in that debate. By raising the question, he was not in any way suggesting that there was not a role for the Security Council under the Charter of the United Nations; the legal argument made by the Special Rapporteur was very sound. Although members had expressed their personal preferences for omitting a reference to the Security Council, he had heard no convincing legal arguments for doing so.

The Chair said that, although it was traditional practice for the Chair to be the last speaker on a topic, as Mr. Gómez Robledo had been unable to attend the earlier meetings at which the Special Rapporteur's third report had been discussed, he would give him the floor to make his statement. Given the limited time and other pressing items on the programme of work, it had unfortunately not been possible to return to the issues raised that morning by Mr. Jalloh concerning draft conclusion 17. In any case, if the Commission decided to refer the draft conclusions to the Drafting Committee, the matter could be discussed further in that context.

Mr. Hmoud, speaking on a point of order, said that it had been his understanding that the end of that afternoon's meeting had been set aside for the Working Group on the Long-term Programme of Work.

The Chair said that it was true that it had been agreed that, time permitting, the Commission would move on to the long-term programme of work after the conclusion of the debate on *jus cogens*. However, as the Commission had not yet finished its consideration of the report, there would not now be sufficient time for the Working Group to meet.

Mr. Nolte, also speaking on a point of order, said that, if the Working Group would not be meeting, the remaining time could be used to resume the discussion on draft conclusion 17.

Mr. Gómez-Robledo said that he would focus his comments on the issues raised in paragraphs 150 to 159 of the Special Rapporteur's third report. It seemed that the controversy surrounding those paragraphs and draft conclusion 17 had arisen in part because, indirectly at least, they put forward a constitutionalist theory about the Charter of the United Nations, according to which Article 103 introduced the principle of normative hierarchy by which the Charter prevailed over all international law and would have the effect of invalidating any treaty that was in conflict with it. That theory was based on a belief that the Charter had created a new world order that regulated all aspects of relations between States, and encompassed an international system of governance based on its principal organs, whose work had facilitated a dynamic interpretation of the Charter's provisions, as was the case in domestic law systems.

However, in his view, that belief did not take account of the imperfections of international society and was more of an act of faith in an ideal world than the result of a rigorous analysis of positive law. According to most of the literature, the intent of Article 103 was more modest, and involved establishing priority between the applicable rules. In fact, Article 103 did not refer to nullity or invalidity but simply stated that obligations under the Charter would prevail over obligations that were in conflict with them. The State thus had an obligation to set aside the other obligation and to give priority to the obligation under the Charter. It would therefore be more reasonable to consider Article 103 as a means of guaranteeing that the obligations established under the Charter were fulfilled effectively and not of derogating from other treaty regimes, however serious the conflict between the obligations. In his view, Article 103 was a provision that aimed to resolve any conflicts that arose between obligations. As such, he wondered what purpose it would serve to establish that an obligation arising from a Security Council resolution would be invalid if it conflicted with a *jus cogens* norm.

Having said that, he considered it entirely appropriate to follow the approach proposed by the Special Rapporteur because the actions of the Security Council were subject to the Purposes and Principles of the Charter. Moreover, it was safe to say that the Security Council had to comply with the most basic principles of legality. Increasingly, there were calls for Security Council resolutions to be based on international law and for the international rule of law to apply to both their procedural and substantive aspects. As the Special Rapporteur had noted, there were no examples of a norm flowing from a Security Council resolution having been declared invalid because it was in conflict with *jus cogens*, but that possibility could not be ruled out entirely. To his mind, draft conclusion 17 did not affect the authority of the Council; on the contrary, it provided added value in relation to both the rule of law and *jus cogens* norms. It was thus a welcome development, in a similar vein to the non-exhaustive list of *jus cogens* norms. He disagreed with those members who did not believe that it fell under the scope of the topic and he was in favour of sending draft conclusion 17 to the Drafting Committee.

Mr. Nolte said that he too would like to share his views on the issue raised by Mr. Jalloh. There was consensus among the Commission members that draft conclusion 17 should be referred to the Drafting Committee. Paragraph 1 established that the binding resolutions of international organizations did not establish binding obligations if they conflicted with a peremptory norm of general international law. Security Council

whether they were mentioned explicitly or not, and no members appeared to dispute that idea. Therefore, the question before the Commission was whether to expressly mention the Security Council or not. The Commission must decide whether emphasizing that point was the right thing to do politically; there would be no convincing legal arguments either way. Of course, there was a reason why drafters often preferred more general and abstract language: if reference was made to particular institutions or events, the risk was that the rule might very quickly appear outdated. In 10 years' time a conclusion containing a specific reference to the Security Council might seem outdated. That consideration should always be kept in mind by drafters and was, in his view, a persuasive argument against including such an explicit mention, although there were certainly others.

Mr. Grossman Guiloff said that there was clearly a substantial level of consensus among the Commission members, and everyone agreed with what was said in paragraph 1 of draft conclusion 17. However, some members were not in favour of singling out binding obligations in the draft conclusion. There also seemed to be general agreement that, as stated in paragraph 151 of the Special Rapporteur's report, although the possibility of the Security Council adopting a resolution which, on the face of it, was in conflict with a peremptory norm of international law was highly unlikely, it was, nonetheless, not impossible. He found it surprising that, in paragraph 152, the Special Rapporteur attached such weight to the views of a single individual who had expressed doubt as to the correctness of the notion that a Security Council resolution was invalid if it conflicted with *jus cogens*.

Of course, there were some valid political reasons to be taken into account and, as Mr. Peter had noted, it was important to be aware of the changing circumstances of the international community. Given that many actors were now avoiding a rule-oriented approach to international relations, the Commission should consider the changing context of rules and the value of formal processes. To his mind, it was not necessary to mention in the draft conclusion that the resolutions of the Security Council could not violate *jus cogens*, as that point would be made in the commentary. Given the already high level of agreement among the members on the matter, he did not see why it could not be left to the Drafting Committee to come up with a satisfactory solution; it need not become an issue of principle. While he did not agree with Mr. Jalloh and Mr. Tladi, they had put forward persuasive arguments, which he looked forward to discussing further. If Mr. Jalloh felt very strongly about the issue, perhaps he could ask another member to chair the meeting of the Drafting Committee at which it was discussed so that he could participate in the debate.

Mr. Šturma said that, while he did not have any substantive objection to mentioning the resolutions of the Security Council in the draft conclusion, he supported the proposal by Mr. Nolte to use more general language, although he would do so for legal rather than political reasons. Emphasizing Security Council resolutions in draft conclusion 17 might lead to a relatively narrow interpretation of what was meant by "resolutions". To his mind, it would be preferable to refer to "binding acts of international organizations", which was much broader and would also include the many binding acts of the European Union, which created more difficulties than the relatively few resolutions adopted by the Security Council. Of course, such a formulation would not exclude Security Council resolutions, and further explanation could in any case be given in the commentary.

Mr. Hmoud said that international organizations were subject to international law and bound by *jus cogens*, and their acts, including binding resolutions, must comply with *jus cogens* norms. If they were in violation of such norms, the organization assumed international responsibility. In his opinion, it was therefore not necessary to highlight the Security Council specifically; it would suffice to refer to "acts and legal resolutions of international organizations".

Sir Michael Wood said that he did not generally believe that mini-debates were helpful in adding clarity, and the current one was the perfect example of that. During the discussion thus far, many very abstract and general positions had been taken, and sweeping statements made about *jus cogens*, about the effect of Article 103 of the Charter, and about Security Council resolutions. He wished to place on record that he was not one of those who generally agreed with the views that had been expressed in the mini-debate.

Mr. Saboia recalled that, when he had made his statement on the report during the first part of the session, he had said that the Security Council was obviously under the obligation to respect international law and comply with norms of *jus cogens*. It was true that he had, on several occasions, expressed concern about some of the resolutions of the Security Council because it sometimes acted on subjects that were controversial and whose legality could be questioned. However, in the case of draft conclusion 17, he shared the view of those members who would rather make a more general statement in the provision itself and leave an express mention of the Security Council, including an explanation of potential concerns in relation to some of its resolutions and those of other organizations, for the commentary.

Mr. Wako said that the Special Rapporteur's reasons for formulating draft conclusion 17 as it stood were set out quite clearly in paragraphs 150 to 152 of the report. That reasoning should not be lost in the reformulation of the draft conclusion. As stated in paragraph 150, as a rule, resolutions of international organizations were not binding under international law. However, the draft conclusion was intended to address the fact that some bodies, such as the Security Council, could actually pass resolutions that were binding, and those resolutions must comply with *jus cogens*. If the Commission were to opt for more general language, that element would be lost. He would therefore propose keeping the original wording or, as a compromise, referring to "resolutions of international organizations, whether binding or not".

Mr. Peter said that it was clear that the very mention of the Security Council instilled fear in many members. They referred to political arguments for not mentioning the Council, but without entering into specifics.

Mr. Huang said that he would gladly explain why he did not believe it was appropriate to specifically mention the resolutions of the Security Council. Firstly, it would be risky from a political point of view. The current international order was based on the outcome of the Second World War, and that political reality had been reflected in the Charter of the United Nations. One could direct criticism at the Security Council but one could not challenge its legality if resolutions were made in accordance with the provisions of the Charter.

Secondly, such a reference in the draft conclusion was not legally justified. The only criterion for the legality of a binding resolution adopted by the Security Council was that it must have received more than nine votes from Council members, including the five permanent members. The Charter did not provide for any judicial or constitutional review system and even the General Assembly could not overrule a Security Council resolution. Security Council resolutions could only be changed by the Council itself. The Charter clearly provided that binding decisions of the United Nations must be implemented by the United Nations as a whole and all its Member States. If the Commission were going to challenge the legality of Security Council resolutions in the context of *jus cogens*, that would open the way for any Member State to do the same, thus jeopardizing the entire United Nations system. While he respected Mr. Peter's views, it was important to be constructive rather than destructive.

Thirdly, there were no procedural safeguards. The Special Rapporteur had mentioned the idea that resolutions of the Security Council that were in conflict with a norm of *jus cogens* were invalid, but that was not for scholars, States, institutions or even the General Assembly to decide. Fourthly, the Commission had a mandate to engage in codification and progressive development of international law, but such a provision would fall under neither part of that mandate, as there was no practice to codify or on which to base progressive development.

The Chair said that the Commission had thus concluded the debate on the Special Rapporteur's third report and would hear his summing-up at its next plenary meeting.

The meeting rose at 6 p.m.

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